UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 98,

Respondent,

and Case 04-CC-229379

POST GENERAL CONTRACTING, LLC d/b/a POST BROTHERS,

Charging Party.

RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE CHIEF ADMINISTRATIVE LAW JUDGE'S DECISION

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Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("Board"), Respondent, International Brotherhood of Electrical Workers, Local 98 ("Local 98" or "Union"), submits this brief in support of its Exceptions. Among other errors, the Administrative Law Judge incorrectly concluded that the Union violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act ("Act") by its speech in September and October 2018,[1] when an agent broadcast a recorded audio message in front of 260 South Broad Street, Philadelphia Pennsylvania ("260 South Broad" or "the Atlantic Building"), a property being renovated by Charging Party, Post General Contracting, LLC d/b/a Post Brothers ("Post Brothers"), and by its agent making a threat to a Post Brothers' agent.[2]

I. STATEMENT OF THE CASE: PROCEDURAL HISTORY AND FACTS

A. Procedural History

Post Brothers filed an unfair labor practice (04-CC-229379) on October 17, 2018. (GCX-1(a)). On October 22, 2019, Dennis P. Walsh, the Regional Director of Region 4, issued a Complaint and Notice of Hearing alleging that the Union had violated Section 8(b)(4)(ii)(B) of the Act. (GCX-1(c)) On October 31, 2019, the Union filed its Answer to the Complaint. (GC-1(e)) Chief Administrative Law Judge Robert A. Giannasi ("ALJ") held the hearing in this case on February 25 and 26, 2020, in Philadelphia, Pennsylvania. He issued his Decision dated May 6, 2020 ("Decision" or "ALJD") and the Union has timely filed Exceptions to that Decision which accompany and are incorporated into this Brief.

[1] Unless otherwise indicated, all dates herein refer to 2018.

[2] Throughout this brief, record citations will be abbreviated and followed by the specific page(s) and line(s), exhibit number, or exception number. The Decision of Chief Administrative Law Judge Robert A. Giannasi in this matter will be "ALJD"; the transcript will be "Tr."; exhibits of the General Counsel, the Respondent, and the Charging Party, will respectively be "GC-," "R-," and "CP-" and joint exhibits will be "Jt-."

B. Factual Statement

Post Brothers is a Pennsylvania limited liability company, engaged in the construction of apartment and condominium buildings in the Philadelphia, Pennsylvania area, including at the Atlantic Building. This is in an area known as "Center City Philadelphia," a very busy city neighborhood, with both commercial and residential uses. (Tr. 54:24-55:5) The Broad Street subway runs under the Atlantic Building and the subway grates are located on the street side of the sidewalk in front of the Atlantic Building. (Tr. 56:1-7) The Atlantic Building is located at the northwest corner of Broad and Spruce Streets which are major thoroughfares with heavy vehicular and pedestrian traffic. Broad Street is the busier of the two streets and is two ways with three lanes in each direction. Spruce Street is a one-way street with two lanes of traffic. (Tr. 33:25; 58:7-9; 237-1) At all relevant times, the Atlantic Building was undergoing renovations and was an active construction area with the front of the building covered in scaffolding (GC-8(a); GC-8(b); GC-9; GC-10; Tr. 237:13-15) and there were neither businesses nor residents occupying the building. (Jt-1 at Stipulation 6; Tr. 34:12-15)

From sometime in or around 2017 until at least the end of 2018, Major Electric Systems, Inc. ("Major Electric"), a non-union contractor, provided commercial electrical services to Post Brothers at the Atlantic Building. (Jt-1 at Stipulation 11) The Union was engaged in a primary dispute and lawful area standards protests with Major Electric during all relevant times. The Union has not been involved in a labor dispute with Post Brothers at any time relevant to this matter. The Union's activities were directed at Post Brothers only as a neutral employer. (Jt-1, Stipulation 16)

On certain days between September 17 and October 19, on the public sidewalk along the outside of the Atlantic Building, the Union's representatives distributed a handbill, spoke to the

public about the Union's issue, and played an audio recording on a loop of a voice saying "your community is crying for jobs, participation, and fair wages" followed by and preceded by the sounds of a crying baby ("Audio Recording"). (Jt-1 at Stipulation 5; R-9) The same handbill was used on all days at issue and it elaborated on the reason for the Union's presence and specifically explained that the Union's issue was with the wage and benefit package offered by Major Electric, a contractor hired by Post Brothers to renovate the property. The Union's handbill advised the public that by doing so, Post Brothers was undermining area labor standards. (Jt-1 at Stipulation 5; GC-7)

There was no allegation or evidence presented at the hearing that any agent from the Union coerced, restrained, engaged in any physical altercation, formed a line of protesters, or intentionally used his body or any object to block any ingress or egress or to otherwise interfere with pedestrian or vehicular traffic. There are no allegations that even one person was prevented or impeded from entering or exiting the Atlantic Building by the Union, its agents, or the location of sound system. The only allegation of any threat is the vague assertion that Local 98's Business Representative Brian Eddis "impliedly threatened to set fire to the property of a representative of Post Brothers." (GC-1(c) at paragraph 6(b)) However, the Union denied any such threat and the credible testimony at the hearing supported the Union's position. (Answer, paragraph 6(b); further discussion below.)

<u>September 17</u>

On September 17, Local 98's Business Representative John Donohoe delivered the Union's amplification equipment to the Atlantic Building in the early afternoon, helped set up the equipment, and then left. (Tr. 237:21-25; Tr. 283:1-7) The equipment included a generator, an audio receiver, an iPod, and two small white speakers. The Union used this same system and

placed it in approximately the same manner each day of protest at the Atlantic Building. (Tr. 84:21 - 86:20) The entire system, which was compact, was set up on the far side of the sidewalk from the Atlantic Building's main entrance, under the scaffolding support beams, and over or right in front of the subway grates. (Tr. 238:4-5) The General Counsel did not make any assertion or present any evidence that the Union's equipment blocked or impeded anyone's passage along the sidewalk or that it ever interfered with ingress or egress for the building. (GC-1(c), GC-8(a), GC-8(b), GC-9, GC-10, R-8; Tr. 238:5-6)

The Union set the Audio Recording to play at level 7 of its amplifier dial on September 17. (Tr. 238:13-16) A few hours later, at approximately 4:00 that afternoon, the police arrived and asked the Union to turn off the equipment and leave. The Union complied. The police did not issue a citation and did not take any other action that day. Philadelphia Air Management was not called or present that day.[3] (Tr. 242:8-22)

Conversation Between Eddis and Steffa

Eddis testified that about 45 minutes or an hour after the equipment was set up on the first day of the protest, Post Brothers' Executive Protection Director, Patrick Steffa, drove his truck next to the Union's speakers, and then opened his door and played music at the highest volume from his car speakers. (Tr. 239:8-17) Steffa then leaned over the scaffolding so that he was about a foot from Eddis and taunted him with comments about the Union. Eddis described the conversation this way: "[Steffa] was trying to engage quite a bit. He told me everything from I hate Local 98, I hope you all die. Youse guys are pieces of shit. We didn't have any problems

[3] "[T]he Civil Affairs Division of the Philadelphia Police Department (the Civil Affairs Division) is assigned to handle, among other things, confrontations during labor disputes. … [T]he Air Management Division of the Philadelphia's Department of Health (the Air Management Division) is charged with the duty of enforcing the City's noise ordinances and regulations." *Metropolitan Regional Council, Carpenters (Society Hill Towers)*, 335 NLRB 814, 821 (2001).

until you show up." (Tr. 239:18-22) Eddis credibly and completely denied making any threat whatsoever to Steffa, implied or direct, on that day or any other day of the Union's protest. (Tr. 239:25-240:12; Tr. 241:11-19)

Steffa, by contrast, testified that Eddis said he "knew where Bridesburg was and that fires happen all the time." Steffa testified that he took this to be a threat regarding the bar he owns in Bridesburg, a different Philadelphia neighborhood, which is near another bar that burned down in December 2017. (Tr. 109:14-21) Steffa testified that this comment was "deeply concerning and upsetting." Nonetheless, he failed to make a report to the police, did not tell anyone else on the scene, and made no report of the incident—despite the fact that his very job is to mitigate threats. (Tr. 81:17-18) Rather, he cursed at Eddis and said: "go F yourself and if you know where Bridesburg is, come see me." (Tr. 110:14-111:5), a challenge that hardly squares with Steffa's earlier testimony that he was concerned and upset.

<u>September 18</u>

On September 18, the Union again arrived at the Atlantic Building, played the Audio Recording, and handed out leaflets to the public. (Jt-1 at Stipulation 5) At some point, Civil Affairs officers and Air Management representative Gary Everly arrived. Everly advised the Union to turn the volume to a 4 on the amplifier to comply with the Philadelphia Noise and Excessive Vibration, Philadelphia Code Chapter 10-400 ("Noise Ordinance"). Eddis so did because he "just wanted to be in compliance." (Tr. 245:18-9) Everly took measurements of the Audio Recording and the ambient noise and based on his readings, determined not to issue a citation. His report summarized:

> PD Civil Affairs Unit requested AMS at a protest to monitor the amplified sound. Met Officer McNeil and waited for the protest to start, taking sound levels of the normal background at 260 South Broad St. Wind SW 12mph and rain began while

> taking readings. Readings cannot be used for compliance due to weather conditions.

(Jt-1 at Stipulation 4; R-1 at page 1; R-2) The Union set the volume at level 4 for the remainder of the protest.

September 19

On September 19, the Union again arrived at the Atlantic Building, played the Audio Recording at a volume level 4 (because that had been approved by Air Management the day before), and handed out leaflets to the public. (Tr. 245:22 - 246:10; Jt-1 at Stipulation 5) Everly took measurements again that day and again determined not to issue a citation. He did not tell the Union to turn down the volume that day. (Tr. 245:25-246:1) His report summarized that:

> At the request of PD Civil Affairs returned to 260 South Broad St. for sound level readings of a protest. Sound level readings were taken on Broad St. where you could not hear the source of the complaint (a crying baby) were 62.0 to 68.3 dBA. At entrance to 260 South Broad where you could hear the source sound level readings were 78.5 – 80.0 dBA. Because of the increase in background noise from work going on in 260 South Board sound was less than 10 dBA. This information was given to PO Alonzo Parker and Sgt. Robert Kennedy of Civil Affairs.

(Jt-1 at Stipulation 4; R-1 at page 2; R-2)

The Protest Generally and The Remaining Days

On each of the days that the Union was at the Atlantic Building, its representatives played the Audio Recording to the public and distributed the handbill. (Jt-1 at Stipulation 5; GC-7) The testimony was consistent from both sides that the Union arrived in or around the late morning or early afternoon and stayed for about four hours. (Tr. 83:14-18; Tr. 87:20-23; Tr. 136:12; Tr. 156:15) Each day that it had a presence at the Atlantic Building, the Union set up the sound equipment in approximately the same manner and in the same location—under the scaffolding, next to or on top of the subway grates near the street side of the sidewalk, across from the main entrance of the Atlantic Building, and out of the way of any pedestrian. (Tr. 37:1-38:10; Tr.

238:3-6; Tr. 246:22-18; GC-8(a); GC-8(b); GC-9; GC-10; R-8; Tr. 287:19-20) On the days that the Union was present after receiving instruction from Air Management at the beginning of its protest on September 18, it played the Audio Recording at volume level 4 on the amplifier dial. This was based on Air Management's determination that this level did not violate the Noise Ordinance. (Jt-1 at Stipulations 4 and 9; GC-11; R-1; R-2; R-3, R-4; R-5; Tr. 176:10-12; Tr. 181:21-22; Tr. 247:19-22; Tr. 248:14-17; Tr. 287:4-5) The witnesses generally agreed that the volume level was consistent throughout the protest period. (Tr. 118:13-15; Tr. 247:19-22; Tr. 287:4-5) Neither Civil Affairs, nor Air Management, nor the police ever asked for the volume to be turned down or for the Union to change its conduct other than the two instances noted above (on September 17 to leave and on September 18 to turn the volume to a level 4). In both of those instances, the Union fully complied with the directives issued. (Tr. 248:1-10; Tr. 228:5-289:15)

The General Counsel presented four witnesses from the neighborhood, all residents of Center City One Condominiums at 1326 Spruce Street, a residential apartment building located catty-corner from the Atlantic Building ("CC1 Residents"). (Tr. 31:16) The four CC1 Residents testified that they could hear the Audio Recording from their apartments and that the noise level was too loud for their preference. Several testified that they could hear the Audio Recording around the neighborhood of the Atlantic Building. None of these CC1 Residents was qualified to take a reading to determine whether the Audio Recording violated Philadelphia's Noise Ordinance. None of the CC1 Residents were customers of Post Brothers or lived in or worked in the Atlantic Building which was unoccupied at that time. (Jt-1 at Stipulation 6) None of the CC1 Residents received from Post Brothers (or any other employer) any compensation for their complaints. Post Brothers did not pay their rent, did not put them up in a hotel, and did not offer them any sort of monetary compensation whatsoever. (Tr. 56:25-57:12; Tr. 78:10-17; Tr. 151:5-

11) There was absolutely no evidence presented that Post Brothers (or any other employer) suffered any economic impact as a result of the noise level of the Audio Recording.

The General Counsel also presented video recordings showing three pedestrians making complaints to the Union. (GC-5; GC-4(a); GC-23) Consistent with this evidence, Donohoe and Eddis acknowledged that they had received some complaints by pedestrians. (Tr. 275:23-25; Tr. 286:24-25; Tr. 290:6-7; Tr. 302:13-14; Tr. 304:18-19) However, both Donohoe and Eddis also testified that they had also received numerous compliments and plenty of support from pedestrians and that more passersby than usual took the Union's handbill as a result of the Audio Recording. (Tr. 249:2-11; Tr. 290:8-10; Tr. 291:10-18) One such pedestrian was Governor Wolf who shook Eddis' hand and said, "good job" as he passed by. (Tr. 249:19-21) Eddis testified that the Union's ordinary protest tactics had grown stale and that playing the Audio Recording increased the number of pedestrians who took the handbill by 75%. (Tr. 250:11-20) Indeed, the CC1 Residents all acknowledged on cross-examination that the level of noise heightened their awareness of the Union's dispute with the Post Brothers. (Tr. 56:8-24; Tr. 78:4-8; Tr. 151:12-25; Tr. 160:19-162:13)

II. ISSUES PRESENTED

- Respondent's Exceptions 1, 2, 3, 4, 5, 6, 7, 11, 15, and 16: Whether the ALJ made numerous factual findings that were not supported by the evidence. *Proposed Answer: Yes.*
- Respondent's Exceptions 2 and 10: Whether the ALJ erred in reaching his conclusion that the Union intended to improperly interfere with the operations at the Atlantic

Building when there was no testimony or evidence to support this conclusion. *Proposed Answer: Yes.*

- Respondent's Exception 5: Whether the ALJ erred in concluding that the noise level exceeded Philadelphia's noise regulations when Philadelphia's own official documents specifically concluded that the noise levels did not exceed said regulations. *Proposed Answer: Yes*
- Respondent's Exceptions 12 and 13: Whether the ALJ erred in his refusal to apply the *Catholic Bishop* rule and violated the First Amendment by finding that the Union violated Section 8(b)(4)(ii)(B) of the Act on June 29, 2018. *Proposed Answer: Yes*
- Respondent's Exceptions 8, 9, 14, and 18: Whether the ALJ incorrectly concluded that Respondent's conduct was coercive and violated Section 8(b)(4)(ii)(B) by playing an audio message on a public sidewalk in Philadelphia, Pennsylvania? *Proposed Answer: Yes.*
- Respondent's Exceptions 15, 16, and 18: Whether the ALJ incorrectly concluded that Respondent's agent made coercive threats which violated Section 8(b)(4)(ii)(B)? *Proposed Answer: Yes.*
- Respondent's Exception 17: Whether the ALJ's credibility determinations were error? *Proposed Answer: Yes.*
- Respondent's Exception 19: Whether the ALJ's proposed Order is unfounded as the entire Complaint should have been dismissed. *Proposed Answer: Yes.*

III. ARGUMENT

A. Findings and Conclusions Regarding Noise Levels

1. The ALJ Made Factual Errors Unsupported By The Record Regarding the Volume of the Audio Recording (Respondent's Exceptions 1, 2, 3, 4, 5, 11)

The ALJ made numerous errors in his factual findings regarding the volume of the Union's Audio Recording. (Respondent's Exceptions 1, 2, 3, 4, 5, 11) In particular, the ALJ found that the volume of the Audio Recording was set well above a level 4 and likely at a level 7 throughout the protest. (Respondent's Exception 1; ALJD, 7:41-8:6; 9:18-20) The ALJ also improperly concluded that the Union manipulated the volume of the recording and even the direction of the speakers to avoid proper readings by the authorities and with the intention of interfering with the operations of the Broad Street site. (Respondent's Exceptions 2, 11; ALJD, 12:6-7) The evidence simply did not support these findings. To the contrary, the testimony was consistent among the witnesses for both the General Counsel and for the Respondent that the volume level was consistent throughout the protest period. (Tr. 118:13-15; Tr. 247:19-22; Tr. 287:4-5) Not a single witness testified that the volume level was set above a level 4 (for more than a couple seconds) after Air Management instructed the Union to turn the volume to that level. Not a single document stated that the Union turned the volume level above a 4 after that instruction.[4] Simply put there was absolutely no basis in the record for the ALJ's finding that the volume level was "often" set to level 7.

[4] At most, there was a text between Donohoe and Eddis indicating that the next day they would set the speakers to address the "tricks" that the Charging Party was employing to magnify the sound of the Audio Recording. There was no evidence presented at the hearing that either Eddis or Donohoe followed through with this plan. Additionally, their point was not to manipulate the reading but rather to address the manipulation that the Charging Party was employing. (GC-21)

The ALJ used these flawed facts to improperly conclude that the Air Management reports have no reliability in determining the real noise levels (Respondent's Exceptions 3 and 4, ALJD, 8:41-42, footnote 9) and that that the volume used for the time covered by the reports differed from the remainder of the protest. These conclusions are also unsupported by the record. Air Management's Inspection Reports concluding that there was no violation of the noise ordinance were admitted as Respondent's Exhibit 1 based on the parties' stipulation. (Jt-1, Stipulation 4) Neither Steffa, nor anyone else from Post Brothers, appealed Air Management's determination that there was no violation. As such, it stands as the official, agreed-upon, and uncontested record. (Jt-1 at Stipulation 4; R-1; R-2; Tr. 220:7-14)

The ALJ's reliance on Steffa's disagreement with Everly's readings is not a valid basis for these conclusions.[5] Everly was the representative of Philadelphia's Air Management. Steffa had no training or knowledge about how to take sound readings. (Tr. 133:1-3) The simple and stipulated fact is that when Everly conducted measurements of the applicable noise levels, he did not find any violation or issue a citation. By finding that the Audio Recording played at volume 4

[5] The ALJ also relied on two lines in a partial transcript of a video recording of a portion of a conversation, where Steffa says, "It's out of – it's out of compliance" and Everly responds, "I'll say that yes." (Tr. 115:25 – 116:5; GC-3(b)) However, a review of the full transcript, observation of the body language on the video, and Eddis's testimony, offer a more complete version of the conversation. Eddis testified that Everly had already made his determination that the volume of the Audio Recording did not merit a citation and Steffa was bullying him at this point in this conversation. (Tr. 244:3-17) This is consistent with Eddis's comment later in the conversation when he says to Steffa, "[G]ary [Everly] made his decision already." (GC-3(a) and (b) at page 3) Eddis's testimony was further consistent with the transcript and the video which show Steffa spoke over the others, interrupted, repeatedly cursed at Everly, and was clearly angry. Everly, on the other hand, repeatedly tried to placate Steffa with comments like, "I can see that," "Yep," "I understand," "I hear you." Everly's comment that, "I'll say that yes," is thoroughly in line with these platitudes. Everly tried to explain to Steffa that he did not agree with Steffa's interpretation of the readings. Everly explained that the average reading of the Audio Recording was 73 and the normal background was 60-70, putting the noise level in compliance. Everly concluded that the appropriate reading was 3 decibels above the background reading. Although Steffa repeatedly challenged Everly's conclusion and aggressively insisted that the Audio Recording reading should be determined to be 94, Everly repeatedly and patiently explained to him that the reading was 73 or 78, not 94. (GC-3(a) and (b))

did not violate the city's Noise Ordinance, Air Management approved of that setting and the Union proceeded under that understanding for the remaining days of the protest. (Tr. 247:19-25; Tr. 285:19-24; G-21 at page 10 text from Donohoe to Eddis at 2:24 p.m. on September 19 stating: "We are good at volume setting 4 Air Management is here Leaving shortly.") For the ALJ to determine that these uncontested reports from the City of Philadelphia are invalid and worthless—years later and without having ever heard the volume level himself—cannot possibly be sustained. These are the official—and uncontested—records from Philadelphia and the ALJ's refusal to acknowledge their validity was not supported by the record.

2. The ALJ Improperly Concluded That the Union Had Violated Section 8(b)(4)(ii)(B) of the Act By Playing Its Audio Recording To The Public (Respondent's Exceptions 2, 8, 9, 10, 12, 13, 14, 18)

a) Highlights of Governing Law

Section 8(b)(4)(ii)(B) of the Act states, in pertinent part, that it shall be an unfair labor practice for a labor organization or its agents:

> (ii) to **threaten, coerce, or restrain** any person engaged in commerce or in an industry affecting commerce, where … an object thereof is --
> (B) forcing or requiring any person to … cease doing business with any other person.

29 U.S.C. § 158(b)(4)(ii)(B) (emphasis added). In 1958, the United States Supreme Court explained that under this provision "a union is free to approach an employer to persuade him to engage in a boycott, so long as it refrains from the specifically prohibited means of coercion" specified in Section 8(b)(4). The Court explained that Congress did not intend to prohibit all conduct related to "secondary boycotts" generally, but rather only intended to "describe[] and condemn[] specific union conduct directed to specific objectives." *Carpenters Local 1976 v. NLRB (Sand Door)*, 357 U.S. 93, 98-99 (1958).

In 1988, in *DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Const. Trades Council* (*DeBartolo*), 485 U.S. 568 (1988), the Supreme Court examined whether the union had violated Section 8(b)(4)(ii)(B) when it peacefully distributed handbills to customers at all four entrances to a shopping mall. There was no dispute there that the union was attempting to exert pressure on a secondary employer through a consumer boycott, *DeBartolo*, 485 U.S. at 570-71, and the Court explained that that the legislative history of the statute showed that there was no indication that Congress intended "to proscribe peaceful handbilling, unaccompanied by picketing, urging a consumer boycott of a neutral employer." *DeBartolo*, 485 U.S. at 583-88.

The *DeBartolo* Court held that only when a union's speech crosses the constitutional line between expression and coercion does it violate Section 8(b)(4)(ii)(B):

> [M]ore than mere persuasion is necessary to prove a violation of § 8(b)(4)(ii): that section requires a showing of threats, coercion or restraints. Those words, we have said, are 'nonspecific, indeed vague,' and should be interpreted with 'caution' and not given a 'broad sweep.'

485 U.S. at 578 (quoting *NLRB v. Drivers*, 362 U.S. 274, 290 (1960)).

The Court held that "the loss of customers because they read a handbill urging them not to patronize a business, and not because they are intimidated by a line of picketers, is the result of mere persuasion, and the neutral who reacts is doing no more than what its customers honestly want it to do." The distinction the Court set out between expression and picketing demonstrates that practically speaking, a union's speech must move to a "confrontation" to be a violation of Section 8(b)(4)(ii). The *DeBartolo* Court was clear that a union's ordinary and peaceful handbilling at a secondary employer does not violate the Act. Rather, a violation occurs only if a union's efforts cross the line from expression to confrontation or coercive conduct.

Indeed, by its clear terms, a violation of Section 8(b)(4)(ii) requires that a union "threaten, coerce or restrain." That phrase, the Court emphasized, is narrowly confined by the

First Amendment to obstruction or violence. The Court held that to avoid constitutional obstacles, a violation must be more than an attempt by a union member to convey a message. That meant that in *DeBartolo* where the union did not patrol or use picket signs, the Court held that the peaceful handbilling of the secondary employer was protected by the First Amendment. *DeBartolo*, 485 U.S. 568; see also, *International Union of Operating Engineers, Local 150 and Lippert Components, Inc.*, 2019 WL 3073999, slip. op., p. 4 (Div. of Judges, July 15, 2019) (*Lippert*). Recognizing that serious First Amendment problems would arise if it construed the Act to prohibit the union's handbilling, the *DeBartolo* Court applied the doctrine of constitutional avoidance, reasoning that it could interpret Section 8(b)(4)(ii)(B) to avoid a constitutional problem.

In 2010, the Board applied *DeBartolo* and the doctrine of constitutional avoidance in *Eliason & Knuth of Arizona, Inc.*, 355 NLRB 797 (2010) (*Eliason*), to hold that a display of large stationary banners at a secondary employer's location did not violate Section 8(b)(4)(ii)(B). The banners in that case were 3 to 4 feet high and 15 to 20 feet long and were placed on public sidewalks as close as 15 feet from the entrances. Union representatives were posted at the banners with flyers to offer the public. *Eliason*, 355 NLRB at 798. The Board found that these stationary banners did not establish signal picketing, were not coercive, and did not disrupt the secondary's operations. In so finding, the Board affirmed that these banners are speech. *Eliason*, 355 NLRB at 809. In order to reach this conclusion, the Board first examined whether the banner displays violated the actual terms of Section 8(b)(4)(ii)(B) and found that there was not even an allegation of such. *Eliason*, 355 NLRB at 800-01. Next, the Board decided that the union's peaceful activity at a secondary site was not coercive secondary "picketing" which violated Section 8(b)(4)(ii)(B). The third and final step in the analysis was to consider whether the

conduct was unlawfully coercive where it "directly caused, or could reasonably be expected to directly cause, disruption of the secondary's operations." *Eliason,* 355 NLRB at 806. The Board found that this banner display was not coercive and did not violate Section 8(b)(4)(ii)(B).

Not long after its *Eliason* decision, the Board considered whether an inflatable rat in front of a secondary employer hospital violated Section 8(b)(4)(B)(ii). In that case, *Sheet Metal Workers Local 15 (Brandon Regional Medical Center),* 356 NLRB 1290 (2010) (*Brandon II*), the union positioned a 16 feet tall inflatable rat on top of a flatbed trailer about 100 feet from the entrance to a hospital. The union had also stationed a member holding a leaflet between two outstretched arms aimed at the traffic at the hospital's entrance. *Brandon II,* 356 NLRB at 1290. The Board, drawing on its own decision in *Eliason* and on the Supreme Court's decision in *DeBartolo*, determined first that there was no evidence of any violation of the literal terms of Section 8(b)(4)(B)(ii) because there was no contention that the inflatable rat "threatened, coerced or restrained the [secondary employer] through violence, blocking ingress or egress or similar direct disruption of the hospital's business." The Board then held that, as it had determined for stationary signs in *Eliason*, there was no "indication in the legislative history of Section 8(b)(4)(ii)(B) that Congress intended to prohibit these types of displays." *Brandon II,* 356 NLRB at 1291. The Board concluded that the inflatable display was not coercive and did not violate Section 8(b)(4)(ii)(B).

b) The Facts Do Not Support the Finding That Respondent Violated Section 8(b)(4)(ii)(B)

There was no assertion or evidence that with the Audio Recording, the Union threatened, coerced, or restrained a secondary employer or anyone else. Likewise, the ALJ was correct in finding that the Union did not engage in picketing in violation of Section 8(b)(4)(ii)(B). (ALJD, 10:22 – 11:5) However, the ALJ erred in finding that the Union's conduct in playing the Audio

Recording was coercive in violation of Section 8(b)(4)(ii)(B). (Respondent's Exceptions 2, 8, 9, 10, 11, 14, 18; ALJD, 11:7 – 12:41)

c) The ALJ Did Not Properly Distinguish Society Hill Towers

The ALJ relied heavily and almost exclusively on *Metropolitan Regional Council, Carpenters (Society Hill Towers)*, 335 NLRB 814 (2001), for his finding that the Union violated Section 8(b)(4)(ii)(B) by playing the Audio Recording to the public. However, the ALJ improperly applied *Society Hill Towers* to the instant case because he failed to distinguish Local 98's ordinary and non-coercive conduct in this case with the extreme conduct by the Carpenters in *Society Hill Towers.* (Respondent's Exception 9)

The facts and circumstances in *Society Hill Towers* were extreme and out of the ordinary. There, the Carpenters' sound amplification well exceeded noise levels permitted under the City of Philadelphia's noise regulations; the Carpenters maintained lookouts for Philadelphia's Air Management representatives so that the union could turn down the amplification; the union used this amplification over more than forty days in five months; and the amplified sound was specifically directed at a residential condominium complex, often between the hours of 9:00 p.m. and 7:00 a.m. on weekdays and 4:00 p.m. to 11:00 a.m. on Saturdays and Sundays. Moreover, the Carpenters used two or three amplification systems which played a taped voice reading the text of a handbill on loop, but which were not synchronized with each other causing the words to be "garbled." In other words, the Carpenters intended its amplified *noise* to disturb the peace rather than to provide the public with substantive information about a dispute. *Society Hill Towers*, 335 NLRB at 827 ("there is no doubt that on several occasions the Respondent was at Society Hill Towers to create noise rather than inform the public of anything"); See also, *Metropolitan Regional Council of Philadelphia and Vicinity v. N.L.R.B.*, 50 Fed. Appx. 88, 91,

2002 WL 31424666, at *3 (3d Cir. 2002) (unpublished) ("the fact that the broadcasts were reduced to unintelligible 'garble' by the use of unsynchronized loudspeakers is further evidence that the Union was concerned more with making coercive and disruptive noise than with disseminating a particular message").

In the instant case, there was no evidence of any such coercive or disruptive intent or effect. The Union only played the Audio Recording from a single source and its substantive message to the public was clear and not merely noise issued for the purpose of disruption. This was an ordinary protest where the Union provided leaflets to the public and sought its attention with amplified sound.[6] The *Society Hill Towers* amplification volume and circumstances were clearly far more extreme than they are in this case.

Additionally, unlike in *Society Hill Towers*, where the ALJ declined to rely upon Air Management's citations because they were under appeal, in this case the reports by Philadelphia's Air Management which found that the Union did not violate the Noise Ordinance were never appealed. *Society Hill Towers*, 335 NLRB at 826. Instead, the two reports from Air Management were the only and final reports and showed that there was no violation of the Noise Ordinance here. Indeed, Post Brothers presented no evidence of any effort to obtain its own readings to show that the amplification was out of compliance with the Noise Ordinance. That the noise in *Society Hill Towers* exceeded Philadelphia's noise ordinance was a critical factor as shown by the portion of the Board's order which ordered the Carpenters to specifically cease and desist from:

> (b) Using a sound system or other amplification method to broadcast its message or any other material or sound at the Society Hill Towers **complex at volume levels which exceed the limits specified in section V(B) of the "Noise and Excessive Vibration Regulations" of the Philadelphia Department of Public**

[6] The Board has explained that "ordinariness" of a union's means of communication (there, banners) undermines the argument that they are coercive. *Eliason*, 355 NLRB at 807.

> **Health, Board of Health**, where an object of such conduct is to force or require Society Hill Towers Owners' Association to cease doing business with Smucker Company.

Society Hill Towers, 335 NLRB at 816 (emphasis added). Although *Society Hill Towers* took place in the very same city as does the instant case, and even though both situations were regulated by the very same local noise ordinance, the documentary evidence shows that Philadelphia's noise ordinance had not been violated here. (Jt-4 at Stipulation 4; R-1)

The ALJ also erred in refusing to distinguish *Society Hill Towers* where there the Carpenters maintained a lookout system so they could alter the amplification levels when officials were in the vicinity and where the Carpenters directed speakers at a residential building during non-daylight hours. The importance of the time of day is demonstrated by the Board-ordered remedy that the Carpenters specifically cease and desist from:

> (c) Using a sound system or other amplification method at or in the immediate vicinity of the Society Hill Towers complex **between the hours of 9 p.m. and 7 a.m. on weekdays, or between the hours of 4 p.m. and 11 a.m. on Saturdays or Sundays,** where an object of such conduct is to force or require Society Hill Towers Owners' Association to cease doing business with Smucker Company.

Society Hill Towers, 335 NLRB at 816 (emphasis added). Here, the Union played its recording during workdays daylight hours. That the Carpenters maintained a lookout system was also a critical factor the Judge who considered this an admission of excessive levels and violation of the local noise ordinance, a factor also not present here. *Society Hill Towers*, 335 NLRB at 827.

The expressive activity in this case is markedly different than the intentionally coercive conduct in *Society Hill Towers*. In *Society Hill Towers*, the union's conduct was aimed at disturbing the peace and causing disruption. In particular, the amplified message there was intentionally "garbled" as it came in an unsynchronized manner from two different amplification systems. The ALJ erred in his application of *Society Hill Towers* which is far afield from the

Union's use of a portable amplification system to only highlight the Union's message to the public. *Metropolitan Regional Council of Philadelphia and Vicinity v. N.L.R.B.*, 50 Fed. Appx. at 91 ("In this case, the excessive volume and the lack of synchronization of the broadcasts make the Union's conduct subject to the Board's legitimate regulation.")

d) The Union Playing the Audio Recording Was Not Coercive In Violation of Section 8(b)(4)(ii)(B)

The ALJ erred in finding that the Union playing its Audio Recording was coercive and violated Section 8(b)(4)(ii)(B). (Respondent's Exceptions 2, 8, 10, 14, 18) Violations of 8(b)(4)(ii)(B) may only be found where a union's speech is accompanied by coercive conduct. The facts here simply do not meet the required standard. Here, the Union only played the Audio Recording during daylight weekday hours on a public sidewalk in a busy urban mixed commercial and residential use area, did not disrupt the Charging Party's property or operations, followed every single instruction given by authorities regarding the volume level, and did not include any defamatory speech. This hardly constitutes coercive activity that violates Section 8(b)(4)(B)(ii). Compare to *SEIU Local 525 (Lenkin Company)*, 329 NLRB 638 (1999) (the union violated section 8(b)(4)(B)(ii) where activity took place at night at a quiet suburban residential residence with a large number of protesters targeting a specific individual, where the union aggressively harassed and threatened the secondary's employees and customers on its private property, and when the union entered a law office to disrupt business), *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB 715, 746-748 (1993) (Board found violation of Section 8(b)(4)(ii)(B) when union conducted mass gatherings and engaged in excessive noise activity including bullhorns, chanting, and whistles directed at building tenants); *Laborers Local 332 (CDG Inc.)*, 305 NLRB 298 (1991) (finding a violation of 8(B)(4)(ii)(B) where 300 to 400 hundred people participated in a march and rally); *Mine Workers (New Beckley Mining)*, 304

NLRB 71, 72-73 (1991) (Board found unlawful coercion of a neutral when a crowd of 50 to 140 union members arrived at 4 a.m. to a motel to yell at quartered strike replacements, basing its holding on the crowd's large size, the yelled messages, and the predawn timing when "guests likely were sleeping and the general public was not astir"). The factors that the Board and courts relied on in these cases were far afield from this case. Here, the Union gave out a handbill and played an Audio Recording to highlight its message and attract the public. There was absolutely nothing coercive in this conduct. Such speech "do[es] not offend the Act if [it is] … incidental to handbilling, designed to convey a message and conducted in a non-confrontational manner." *Lenkin Company*, 329 NLRB at 691 (ALJ) (other cases and materials cited therein omitted).

Eliason asks whether a union's conduct was "nevertheless unlawfully coercive" where it "directly caused, or could reasonably be expected to directly cause, disruption of the secondary's operations." *Eliason*, 355 NLRB at 805-06. There was no evidence presented that the Charging Party suffered any disruption to its business. (Respondent's Exception 8) The ALJ's conclusion that the Union intended to and did interfere in the Atlantic Building's operations is a misstatement of the facts and misapplication of the law. (ALJD, 11:41 – 12:41; Respondent's Exceptions 2, 10, 18) The General Counsel's witnesses were annoyed by the Audio Recording. However, there is no constitutional shield from annoyance; free speech requires that members of the public will hear messages to which they would not otherwise be exposed. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418-19 (1971) ("[S]o long as the means are peaceful, communication need not meet standards of acceptability.") Inconvenience or annoyance as articulated by the Center City One residents and the Charging Party's employees is simply not the lynchpin here. Peacefully amplifying a message in conformance to local directives and ordinances, during daylight hours, in a busy urban use area is far from unlawful coercion.

3. The Doctrine of Constitutional Avoidance Requires the Board to Find That the Union's Conduct Did Not Violate Section 8(B)(4)(ii)(B) (Respondent's Exceptions 12 and 18)

One of the most basic tenets of statutory construction is known as the *Catholic Bishop* rule. Under this rule, when interpreting a statute in a particular manner would raise serious constitutional problems, a court should construe the statute to avoid such issues unless such a construction is obviously contrary to Congress's intent. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). The United States Supreme Court has stated that this principle is so deeply rooted and applied that it is "beyond debate." *DeBartolo*, 485 U.S. at 575 (citing *Murray v. The Charming Betsy*, 2 Cranch 64 (1804), *Catholic Bishop of Chicago*, 440 U.S. at 500-01 and many others).

The Court in *DeBartolo* and the Board in its progeny have invoked the *Catholic Bishop* rule to avoid "serious questions of the validity of § 8(b)(4) under the First Amendment." *DeBartolo*, 485 U.S. at 575-76 ("We agree with the Court of Appeals and respondents that this case calls for the invocation of the *Catholic Bishop* rule, for the Board's construction of the statute, as applied in this case, poses serious questions of the validity of § 8(b)(4) under the First Amendment."). The *Eliason* Board explained its obligation to avoid the constitutional issues:

> Our conclusion about the reach of the prohibition contained in Section 8(b)(4)(ii)(B) is strongly supported, if not compelled, by our obligation to seek to avoid construing the Act in a manner that would create a serious constitutional question. Governmental regulation of nonviolent speech—such as the display of stationary banners—implicates the core protections of the First Amendment. The crucial question here, therefore, is whether the display of a stationary banner must be held to violate Section 8(b)(4)(ii)(B) or, instead, 'whether there is another interpretation, not raising these serious constitutional concerns, that may fairly be ascribed to' the statutory provision. *DeBartolo*, 485 U.S. at 577.
>
> As we indicated above, the answer to the question posed by the Supreme Court in *DeBartolo* is clear in this case. Nothing in the language of the Act or its legislative history requires the Board to find a violation and thus present for judicial review the constitutionality of Section 8(b)(4)(ii)(B) as applied to the

> peaceful display of a stationary banner. Rather, the display of a stationary banner, like handbilling and even certain types of picketing, is noncoercive conduct falling outside the proscription in Section 8(b)(4)(ii)(B).

Eliason, 355 NLRB at 807. See also, *Brandon II*, 356 NLRB at 1293 ("Our conclusion that the conduct at issue here was lawful is strongly supported by application of the 'constitutional avoidance' doctrine. As explained in *Eliason*, the Board must avoid, if possible, construing the statutory phrase 'threaten, coerce or restrain' in a manner that would raise serious constitutional problems under the First Amendment.").

Under the *Catholic Bishop* rule, if the Board believes there is any ambiguity in applying Section 8(b)(4)(ii)(B) to the facts at hand, it should interpret the statutory language to avoid raising serious First Amendment concerns. As argued above, the case law is clear that the facts here do not constitute a violation of Section 8(b)(4)(ii)(B). However, if the Board believes the facts potentially violate Section 8(b)(4)(ii)(B), under the *Catholic Bishop* rule, a reasonable alternate statutory interpretation must be applied to avoid necessarily raising serious First Amendment questions.

4. Affirming the ALJ's Conclusion That the Union's Actions Violated Section 8(b)(4)(ii)(B) Would Violate the First Amendment As Applied (Respondent's Exceptions 13 and 18)

It is certainly well established that peaceful labor demonstrations are entitled to First Amendment protection.[7] See for example, *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (dissemination of information about a labor dispute must be regarded as within the area of free discussion that is guaranteed by the Constitution); *Tucker v. City of Fairfield*, 398 F.3d 457, 462 (6th Cir. 2005) (First Amendment protects peaceful labor demonstration on public rights of

[7] Although Respondent is only arguing here that the First Amendment would be violated on an as applied basis, it does not waive any argument that Section 8(b)(4)(ii)(B) should now be held invalid on its face under the First Amendment to the United States Constitution. See *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015).

way). The First Amendment protects effective speech, not merely uttered words, and effective speech sometimes requires that ideas be transformed into musical speech, loud speech, financial speech or other forms of expression that a casual reading of the First Amendment might not reveal as speech. *Stokes v. City of Madison*, 930 F.2d 1163, 1168-69 (7th Cir. 1991) (and cases cited therein). Courts have repeatedly explained that sound amplification is protected and often necessary for effective communication. See for example, *Saia v. People of State of New York*, 334 U.S. 558, 561 (1948); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment."); *Startzell v. City of Philadelphia*, 533 F.3d 183, n.10 (3d Cir. 2008) (as a general proposition, "amplified speech, such as through the use of bullhorns, is protected expression").

The evidence in this case demonstrates that the Union's conduct was wholly expressive and is protected by the First Amendment to the United States Constitution. The Union used an amplified recorded message to educate the public on the dispute. That the Charging Party and a few neighbors were irritated by the messaging cannot deprive the sidewalks of their constitutionally protected status as a public forum and cannot curtail the Union's right to communicate with the public. This case is not like *Society Hill Towers* where the union's use of amplification was intentionally disruptive and coercive rather than expressive. Here the Union played the Audio Recording to draw attention to the Union's handbill and substantive message. Such speech is clearly protected by the First Amendment.

B. Findings and Conclusions Regarding Alleged Threats By Eddis

1. The ALJ Made Unsupported Factual Findings and Errors of Law Regarding the Allegations of Threats By Eddis (Respondent's Exceptions 6, 7, 15, 16 and 18)

In finding that there "was at least an implied threat of physical harm or harm to the property of a representative of a neutral to the Respondent's dispute at the Broad Street site" and that this "amounted to coercion under subsection (ii) of Section 8(b)(4)(B) of the Act," (Respondent's Exception 16; ALJD, 13:4-31; 14:14-16), the ALJ relied on his conclusion that "Eddis did not refute Steffa's testimony about the recent fire near Steffa's bar." (Respondent's Exception 6; ALJD, 10:9-10) This is simply incorrect. In fact, Eddis testified as follows:

Q. You heard [Steffa's] testimony. Is that correct?
A. That's correct.
Q. He testified about comments that you made regarding fire and his -- and possibly his bar in Bridesburg. Is that correct? Do you recall that?
A. I heard the comments of what he said.
Q. Can you comment on the veracity of that testimony?
A. Outside of no?
Q. Go ahead and explain, please.
A. I would never say something like that.
Q. Did you say anything to him that day about setting a fire or implying that you might set a fire?
A. Absolutely not.
…
Q. Did you make any references to his bar specifically?
A. No.
Q. Did you ever threaten him in any way during that conversation?
A. Absolutely not.
Q. Did you ever threaten Mr. Steffa during the -- any of the days that you were at this protest, did you say anything to him on any of the other days about a fire or about his bar?
A. Never.

(Tr. 239:25 - 241:19) Exactly contrary to the ALJ's factual statement, Eddis did specifically and clearly deny directing any threat to Steffa regarding a fire.

The ALJ also used his finding that Eddis told Steffa that the crying baby would "leave also" if "Major Electric left the Broad Street site" in order to conclude that the alleged threat was sufficiently related to the admitted secondary objective. (Respondent's Exceptions 7 and 15; ALJD, 10:10-11 and 13:16-31) This is a red herring. Local 98 had already admitted secondary intent and as such, even if true, this statement shows absolutely nothing. (Jt-1 at Stipulation 16) The ALJ used the premise of the case to reach his conclusion: It has already been acknowledged that if Major Electric went away, Local 98 would have stopped its protest, including playing the Audio Recording. That was the entire and admitted purpose of the protest, the very essence of secondary intent. For the ALJ to use that premise to reach his conclusion about a different statutory requirement is flawed conclusive reasoning which simply must fail.

C. The ALJ's Credibility Determinations Should Be Overturned (Respondent's Exception 17)

Respondent acknowledges that the Board's established policy is not to overrule an administrative law judge's credibility determinations unless the clear preponderance of all the relevant evidence convinces it that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). This standard is not a rubber stamp and the standard is met in this case.

The ALJ was quite clear during the hearing that that he was upset and bothered by the text exchange between Donohoe and Eddis. (Tr. 260:5 – 261:11) However, this text exchange, when broken down to its components, was not legally significant. [8] Nonetheless, the ALJ was

[8] There were no unacknowledged facts that came to light and there are no facts which violate the Act in these texts. Donohoe's reference to the Union setting the volume dial to a "7" on September 17 was acknowledged by the Union. However, it was also acknowledged—and was uncontested—that the Union turned the entire system off that day as soon as it was asked to do by the police and then on all following days set the dial to a volume level 4 to comply with Air Management's directive. The comments such as Steffa "not taking it well" and that Steffa and Eddis had a "back & forth" may be considered offensive,

clearly very disturbed by the exchange which influenced his credibility determination such that he credited all the testimony of Steffa over all the testimony of Eddis and Donahoe.

By way of example, the ALJ credited Steffa's testimony that Eddis threatened him. However, Steffa's testimony did not conform to the other evidence admitted or the lack of evidence. Steffa testified that Eddis threatened to burn down his bar and also that there were numerous Post Brothers security officers at the site with cameras. (Tr. 126:8-18; 127:2 - 128:7; Tr. 239:2-6) Moreover, Steffa claimed that his own cousin was sitting within five feet of him (Tr. 111:19-21; Tr. 124:10-11; Tr. 284:3-5) and that the police were present that afternoon (Tr. 242:11-17). Despite all this, Steffa did not ask anyone for assistance, did not file a police report, did not take a single picture, did not call the police regarding a threat, and did not make any recording of the conversation. (Tr. 128:8-19; Tr. 242:24-243:7) Instead, Steffa—the self-proclaimed "bodyguard" for the Post Brothers executives—was apparently scared and disturbed by this alleged (and at worst completely vague) "threat" but took no action, despite the immediate availability of police, security guards, his own staff with cameras, and his own cousin. (Tr. 125:8; Tr. 126:8 - 18; Tr. 128:8-19; Tr. 242:24-243:7) There was not a single photograph, a single recording, or a single corroborating witness and although police were on the scene that very same day, Steffa did not file a report with them or even mention to them that he had be threatened by Eddis. (Tr. 242:24 -243:1; Tr. 127:11-128:17; Tr. 242:24-243:7) This simply makes no sense for a man whose very job is to "mitigate threats." (Tr. 81:17-18) Moreover, his testimony was internally contradictory. He complained about the threats but also described this

but they simply do not violate the Act. The Union has acknowledged its secondary intent, an intent to put pressure on Post Brothers—directly or through the public—without threats, restraint, or coercion. That Donohoe and Eddis noted that their protest effectively exerted pressure does not equate to a threat, restraint, or coercion. As Eddis explained, "I don't really think that it was funny or that I was happy that people were crying. I was happy that we were able to get people's attention." (Tr. 261:1-10)

conversation as "nice, colorful banter with Mr. Eddis back and forth" (Tr. 107:14-15) and "friendly banter." (Tr. 109:7) Additionally, he testified that he responded to Eddis' alleged threat with the comment: "go F yourself and if you know where Bridesburg is, come see me." (Tr. 110:14-111:5) This threatening retort is a far cry from a response that would be expected from a scared individual.

In contrast, Eddis and Donohoe's testimonies contained no internal inconsistencies and provided straight forward and credible responses. Moreover, where Steffa struggled to remember even what date he was apparently threatened, Eddis had a clear and credible rendition of the chronology and the facts which the ALJ used but did not credit to Eddis.[9] (ALJD, 6:fn 5)

D. The ALJ's Order Is Improper (Respondent's Exception 19)

The ALJ's remedy Order is improper because his basis for such an Order fails as unsupported by the record and as a matter of law.[10] (ALJD, 14:25 – 15:30; Respondent's Exception 19)

III. CONCLUSION

For the foregoing reasons, the Union respectfully submits that the Board find that the ALJ erred as set forth in Respondent's Exceptions and as discussed above. In particular, the

[9] Eddis testified that the conversation between Steffa and him occurred on September 17. (Tr. 239:9) Steffa's testimony did not specify a date but places the conversation on the first day of the protest and the first day that Air Management Gary Everly was present, which was September 18. (Tr. 89:8 - 90:25; Tr. 108:20 – 109:3) Steffa's chronology was wrong as he also placed the conversation on video with Air Management on the first day of the protest, which is incorrect. That video shows on its face that it was recorded on September 19, which was the second day that Air Management was present and the third day of the protest. (GC-3(a); R-1; R-2; Jt-1 at Stipulation 5)

[10] Respondent does not object to the specific wording set forth in the Order in the event that an order is imposed. (ALJD, 14:25 – 15:30)

Union respectfully requests that the Board find that the Union did not violate Section 8(b)(4)(ii)(B) in any manner in or around September and October 2018 at the Atlantic Building in Philadelphia, Pennsylvania.

Respectfully submitted,

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Dated: June 3, 2020

CERTIFICATE OF SERVICE

I hereby certify that Respondent's Exceptions To The Chief Administrative Law Judge's Decision and Brief In Support Of Its Exceptions To The Chief Administrative Law Judge's Decision were electronically filed and served on the following via email:

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